IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 191 of 2006

In

Notice of Motion No.592 of 2006

In

L.C.Suit Noi.5252 of 2001

Jagidsh Avasthi and Ors. ... Appellants

V/s

M/s Metro Steel Products ... Respondent

Mr. C.K.Tripathi for Appellants

Mr.D.R.Jhuriya for Respondents

CORAM:D.G.KARNIK,J.

DATED:25th Aug. 2006

P.C.:-

1. When the Appeal was called out Mr.D.R.Jhuriya, advocate, appeared for the respondent claiming to have been instructed by Mr. Vikas K. Mahangare for the respondent. However, subsequently he withdrew his appearance and stated he has no instructions to appear in the matter. No one else is present for the respondent.

2. Heard learned Counsel for the appellant.

3. This appeal is directed against the order dated 2-3-2006 passed by the City Civil Court, Mumbai dismissing Notice of Motion No.592 of 2006 taken out by the Appellant for restoration of his Suit being L.C.Suit No.5252 of 2001.

4. The appellant herein filed a suit, bearing L.C.Suit No.5252 of 2001, against the Respondent for injunction. Mr.Somandy i/b Vinod Mistry and Co. was appearing for the respondent in the Suit. The suit was listed on board on 29-5-2005. On that day the learned trial Judge passed the following order:

> "Adv. D.T.Gandhy for the plff is present. None present for the defts.
>
> As the defts. are not present and ad-interim was granted to the plff. on 10-10-01. N/M is kept along with the suit. Service of Wr/summ. is already waived by the defts. on the same date. Yet there is no W/S on record. Suit shall proceed in the absence of W/S adjd. for recording evidence on 8-11-2005,"

5. Thereafter the suit was adjourned to 8-11-2005 and then to 12-12-2005. On 12-12-2005 the Court passed the following order :

> "At the request of plff's adv. last chance is given to file the affidavit of evidence and documents failing which the suit will have to be dismissed on next date. Adjd. to 31-1-05."

6. On 31-1-2006 the plaintiff was present but his advocate was absent. The Court then passed an order dismissing the suit for want of prosecution.

7. On the following day i.e. 2-2-2006 the appellant took out a motion, bearing Notice of Motion No 592 of 2006, for recalling the order dated 31-1-2006 and for restoration of the suit on the file. In the affidavit in support of Notice of Motion the appellant stated the reasons why he could not file the affidavit of evidence and documents on 31-1-1006. He stated that the original documents pertaining to the subject matter of the suit were submitted in another suit, bearing L.C.Suit No.6233 of 1981, and First Appeal against the decision in that suit was pending in the High Court. He was therefore unable to produce the original documents and file an affidavit proving the documents.

8. When the motion came up for hearing, learned trial

Judge did not address himself to the issue whether the plaintiff had made out sufficient cause for not being able to file affidavit on 31-1-2006 and to produce the original documents. On the other hand the learned Judge observed that the defendant had left the suit premises about 18 years ago and therefore the plaintiffs could not have filed a suit on an apprehension. The learned Judge held as the respondent-defendant in the suit had left the premises 18 years the suit was not entitled and on this ground the Notice of Motion is not maintainable.

9. In my view, at the hearing of the motion the learned Judge was not called upon to consider the merits of the suit nor was required to consider whether the suit was maintainable. The only issue before the learned Judge was whether the plaintiff had sufficient cause for not filing the original documents and affidavit in lieu of examination in chief. The statement made by the appellant that the original documents on which he wished to rely upon were filed another suit and he could not withdraw the documents as first appeal against the decision in the said suit was pending in the High Court was not controverted by the respondent. The appellant was present in the Court on 31-1-2006 and his presence has been noted in the Roznama. May be that his advocate was absent due to some reason but in that event the Court could have heard the appellant and asked him whether he had any valid reason for not production of

the documents and filing of the affidavit. That does not appear have been done by the trial Court. At the hearing of the motion for restoration of the suit, the learned Judge misdirected herself in considering the question of maintainability of the suit instead of addressing the issue as to the sufficiency of the cause made out by the appellant. For non production of the documents. The order is therefore clearly erroneous and is required to be set aside.

10. In view of the uncontradicted statement made in the affidavit in support of the Motion explaining the inability to produce the document, I hold that the plaintiff had sufficient cause for non production of the documents and not filing an affidavit in lieu of examination in chief.

11. For these reasons the appeal is allowed and the Notice of Motion No.592 of 2006 taken out in Suit No.5252 of 2001 is made absolute and the suit is restored to file. The appellant shall appear before the City Civil Court on 25-9-2006. Thereafter the Court shall issue fresh notice to the defendant and hear the suit on its merits.

12. All concerned to act on copy of this order duly authenticated by the associate of this Court.

13. Copy of this order be sent to the City Civil Court,

(D.G.KARNIK,J)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Civil Application No.261 of 2006

In

APPEAL FROM ORDER NO. 191 of 2006

In

Notice of Motion No.592 of 2006

In

L.C.Suit No.5252 of 2001

Jagidsh Avasthi and Ors. ... Appellants

V/s

M/s Metro Steel Products ... Respondent

Mr. C.K.Tripathi for Appellants

Mr.D.R.Jhuriya for Respondent

CORAM:D.G.KARNIK,J.

DATED:25th Aug. 2006

P.C.:-

. In view of the order dated 25-8-2006 passed in the appeal, the suit is rstored. Interim order, if any

passed earlier in the suit shall continue to operate until hearing of the suit.

. C.A. disposed of.

(D.G.KARNIK,J.)